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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME BENAVENTE,

Defendant and Appellant.

F048537

(Super. Ct. No. 133420)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

Kim Malcheski, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Janis Shank McLean and Barton Bowers, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found appellant Jaime Benavente guilty of one count of carjacking (Pen. Code[1], § 215, subd. (a)) with a gang enhancement (§ 186.22, subd. (b)(1)) and guilty of

[1] All further statutory references are to the Penal Code unless otherwise stated.

one count of resisting, delaying, or obstructing a peace officer (§ 148, subd. (a)(1)), also with a gang enhancement (§ 186.22, subd. (d)). The court sentenced appellant on the first count to a prison term of 15 years to life (§ 186.22, subd. (b)(4)(B)) and on the second count to a concurrent two-year midterm (§ 186.22, subd. (d)). Appellant appeals, claiming substantial evidence does not support the jury's true finding of the gang enhancement associated with count two, trial counsel was ineffective in failing to object to the purported speculative opinion given by the expert on gangs, and his sentence constitutes cruel and unusual punishment violating the state and federal Constitutions. We affirm.

FACTS

On September 6, 2004, a group of people socialized at a home in Tulare County. Jose C., one of the people present, had parked his father's car in front of the home. With the keys in the ignition, Jose prepared to leave with two others. While locating the other two, Jose noticed a white vehicle drive past the home. The vehicle stopped. Four or five men got out of the vehicle, yelling gang slogans and flashing gang signs, both associated with "BPC," a clique of the Northern (Nortenos) criminal street gang in Tulare County.

In response, the people at the home retreated toward the door. Witnesses identified appellant and his codefendant, Rudy E., as two of those aggressors approaching them. Appellant and Rudy E. are each members of BPC. Rudy attempted to strike Jose, but missed and hit Jose's friend. Another person at the scene, Victor M., saw one of the aggressors take a rifle case out of the white vehicle and place it in Jose's father's car. After learning the police had been called, the aggressors vacated the premises and left in the white vehicle and Jose's father's car.

Tulare County sheriff deputies obtained a warrant to arrest appellant in connection with the carjacking of Jose's father's car. On September 7, 2004, a deputy knocked on the door of appellant's girlfriend's home and announced his presence. Immediately, he heard movement inside the home. Another deputy by the side door saw appellant and

Rudy E. emerge and run away from the home in their gang colors. The deputy identified himself and ordered them to stop, but they did not. The deputies found the two hiding underneath a car in an open garage. When the deputies ordered them to emerge, appellant and Rudy surrendered without further incident.

A police expert testified at trial about Nortenos and a specific clique called BPC. The expert also testified about the gang's turf, colors, number, hand sign, and criteria to determine gang status. Appellant met seven of the 10 possible criteria, though he only needed four to be considered a member. The expert also discussed the gang's primary activities: harassing people; carrying guns; and committing burglaries, assaults, and homicides. When asked if appellant's evasion of the police benefited, promoted, or furthered the gang, the expert answered, "It showed they'll be defiant towards law enforcement. They have no respect for law enforcement. And also, it's going to show to their gang that they have no fear for law enforcement, and it's going to bump them up higher in their chain of command pretty much." On cross-examination, when asked how running from the deputies benefited the gang, the expert testified that "[appellant is] showing . . . his other gang members that he's not afraid of the cops. He's going to run, hide, do what he has to do to get away." However, when asked if any crime committed benefits a street gang, the expert responded in the affirmative because "he's showing the fellow members of the gang that he's not afraid of the cops. He's going to do what he wants." In addition, the expert stated that self-preservation has no bearing in his opinion, although it could be an additional motive for the gang member's actions.

DISCUSSION

I. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S TRUE FINDING OF THE GANG ALLEGATION AS TO COUNT TWO.

Appellant first contends that substantial evidence does not support the jury's finding true the gang enhancement associated with count two. He dismisses the expert's

opinion that the gang benefited from appellant's running from the deputies as speculative and not tied to any other evidence. We disagree.

Section 186.22, subdivision (d) contains the gang enhancement associated with count two. It does not criminalize mere gang membership (*People v. Gardeley* (1996) 14 Cal.4th 605, 623); rather, it imposes additional punishment for "[a]ny person who is convicted of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of, at the direction of or in association with, any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (d).)

To determine if substantial evidence supports the judgment, we examine the entire record in the light most favorable to the judgment below. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 660.) Substantial evidence must be reasonable, credible, and of solid value. (*Ibid.*) We also presume the existence of every fact the lower court could reasonably deduce from the evidence in support of its judgment. (*Ibid.*) We must ask if a rational trier of fact could have found the allegation true "'beyond a reasonable doubt based upon the evidence presented.' [Citation.]" (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1223.)

A trier of fact may rely on expert testimony about gang culture and habits to reach a finding on a gang allegation. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930-931.) California law permits a person with "'special knowledge, skill, experience, training, or education' in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion (*id*., § 801)." (*People v. Gardeley, supra,* 14 Cal.4th at p. 617.) However, Evidence Code section 801 limits this testimony to that "'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' [(Evid. Code, § 801, subd. (a).)] The subject matter of the culture and habits of criminal street gangs . . . meets this criterion. [Citations.]" (*People v. Gardeley, supra,* at p. 617.)

Appellant argues the prosecution did not establish the required evidentiary foundation for the expert's opinion regarding how appellant's running from the deputies actually benefited the gang. This narrow focus misconstrues the statute. The statute requires only that appellant "committed [the crime] for the benefit of, at the direction of or in association with, any criminal street gang . . . ." (§ 186.22, subd. (d).) "A crime committed by a defendant in association with other gang members or demonstrated to promote gang objectives may be gang related," based on evidentiary support, other than appellant's prior offenses and gang activities, to find appellant committed a crime for the benefit of, at the direction of, or in association with a criminal street gang. (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762.) Here, substantial evidence supports the jury's inference that appellant acted in association with his gang when he ran from the deputies.

In *People v. Morales*, an expert assumed the critical facts of the case and opined gang members committed hypothetical crimes for the benefit of, at the direction of, or in association with a criminal street gang. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1197.) The expert in *Morales* stated that "one gang member would choose to commit a crime in association with other gang members because he could count on their loyalty …. In addition, the very presence of multiple gang members would be intimidating." (*Ibid.*) Even though the expert in *Morales* testified that any such crime would satisfy the benefit/direction/association element, this testimony nevertheless related to the defendant's particular crimes. (*Ibid.*) Likewise, the expert here had just been asked "to assume the facts of these crimes as the basis of his opinion." (*Id*. at 1198.) As the court stated in *Morales*, "logically, if any such crime satisfies this element, then so did [appellant's] crimes." (*Ibid.*) While conceivably several gang members could commit a crime together unrelated to the gang, no evidence supports such a statement, just like in *Morales*. (*Ibid.*) Instead, the evidence shows appellant ran from the deputies with a fellow gang member, both wearing gang colors. Therefore, the jury

could reasonably infer the requisite association from appellant's commission of the crime with his fellow gang member.

We also disagree with appellant's argument that sufficient evidence did not support the specific intent element of the gang enhancement. (§ 186.22, subd. (d).) Again, "specific intent to *benefit* the gang is not required. What is required is the 'specific intent to promote, further, or assist in any criminal conduct by gang members….'" (*People v. Morales, supra*, 112 Cal.App.4th at p. 1198.) Here, evidence showed appellant intended to evade the deputies, that he intended to commit this crime in association with Rudy, and that he knew Rudy was a member of his gang. Like in *Morales*, a jury could reasonably infer that appellant intended to assist criminal conduct by a fellow gang member. Appellant's action, combined with his knowledge of "the purpose of the perpetrator of a crime, [allows] his intent to aid the perpetrator [to be] *inferred*. In the absence of evidence to the contrary, the intent may be regarded as established. [Citation.]" (*Ibid*, internal quotations omitted .) Thus the evidence here creates a reasonable inference that appellant possessed the specific intent to further Rudy's criminal conduct.

Generally, experts may state their opinion based upon facts given in a hypothetical question asking them to assume their truth; however, the hypothetical must root itself in facts shown by the evidence. (*People v. Gardeley, supra,* 14 Cal.4th at p. 618.) If experts base an opinion on material not admitted into evidence, the material must be reasonably relied upon by experts in that particular field in forming their opinions and be reliable. (*Ibid.*) In *People v. Killebrew*, we found the expert's testimony regarding the minor's specific intent to "promote, further, or assist" in criminal conduct by gang members (§ 186.22, subd. (b)(1)) exceeds "the type of culture and habit testimony found in the reported cases." (*People v. Killebrew, supra,* 103 Cal.App.4th at p. 654.) In *Killebrew*, the expert officer testified "that when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively

possess the gun." (*Id.* at p. 652.) This testimony provided the only evidence to establish the elements of the crime. (*Id.* at p. 658.) While the expert here testified to the "subjective *knowledge and intent*" of appellant (*ibid.*), the expert's opinion had sufficient evidentiary basis to support it. In contrast to *Killebrew*, the gang allegation directly derives its support from the crime committed by appellant with fellow gang member Rudy. In addition, both wore gang colors as they fled the deputies, and both had committed the earlier carjacking.

Unlike *Killebrew*, here appellant had committed the crime associated with the gang allegation. Instead of an expert postulating what a gang member might accomplish with a weapon, the expert discussed appellant's motivation for the crime he committed as a gang member. (See *People v. Muniz* (1993) 16 Cal.App.4th 1083 [allowing expert's opinion that the defendant prepared to commit a drive-by shooting based upon expert's knowledge of the defendant with a gun in a car with three other gang members].) In *People v. Gamez*, officers searched the defendant's home after a witness to a drive-by shooting the day before identified the defendant as the shooter. (*People v. Gamez* (1991) 235 Cal.App.3d 957, 963, disapproved on other grounds in *People v. Gardeley*, *supra*, 14 Cal.4th at p. 624.) In that case, the expert relied not only on statements of unidentified gang members, but also personal observations and experience, the observations of other officers in the department, police reports, a photo of the defendant making a gang sign with his hand, and writings that displayed his gang affiliation. (*Gamez*, *supra*, at p. 967.) *People v. Gamez* found the evidence sufficed to prove the defendant committed the crime for his gang's benefit with the specific intent to promote or assist the gang. (*Id.* at p. 978.) As in our case, the jury needed the expert testimony only to give meaning to appellant's actions. (*Id.* at p. 967.)

II. TRIAL COUNSEL'S FAILURE TO OBJECT TO PURPORTEDLY SPECULATIVE OPINIONS OF THE PROSECUTION'S EXPERT DID NOT SHOW INEFFECTIVENESS.

Appellant next contends his trial counsel was ineffective by failing to object to the expert's opinions as speculative and inadmissible. We disagree.

To prove ineffectiveness of counsel, appellant must show a deficient performance by his counsel because the representation fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) In addition, he must demonstrate "prejudice flowing from counsel's performance or lack thereof" by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*People v. Gray* (1998) 66 Cal.App.4th 973, 988.) "'Courts must in general exercise deferential scrutiny in reviewing such claims.'" (*Id.* at p. 989.) Every effort must be made "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (*Strickland v. Washington, supra,* at p. 689.) "A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound strategy." (*People v. Gray* (2005) 37 Cal.4th 168, 207.)

Here, appellant's claim of ineffective assistance of counsel arose from counsel's failure to object to purported speculative testimony by the prosecution's expert. As we have already discussed, the expert's testimony was not mere speculation. Even if we were to assume the objections would not have been fruitless, counsel's failure to object can be seen as matter of sound strategy. It is entirely plausible that counsel tactically questioned the expert to purposefully weaken all of the expert's testimony. Counsel's cross-examination showed the expert's broad view of what acts show a specific intent to

further, promote, or assist in gang members' criminal conduct. Indeed, counsel's cross-examination pointed to arguable inconsistencies and vagueness in the expert's testimony.

III. APPELLANT'S INDETERMINATE SENTENCE OF FIFTEEN YEARS TO LIFE DID NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FEDERAL AND CALIFORNIA CONSTITUTIONS.

Appellant asserts that his indeterminate sentence of 15 years to life constitutes cruel and unusual punishment in violation of the federal and California Constitutions. We reject this argument.

The California Constitution forbids "cruel *or* unusual punishment," whereas the federal Constitution precludes "cruel *and* unusual" punishment. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196, fn 5.) Thus, if we find appellant's punishment does not violate California's Constitution, it cannot violate the Eighth Amendment. Under the California Constitution, the issue balances on if the sentence "'is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*People v. Gray*, *supra*, 66 Cal.App.4th at p. 992.) *In re Lynch* (1972) 8 Cal.3d 410 identified three techniques for courts to make this finding. "First, they examined the nature of the offense and the offender. [Citation.] Second, they compared the punishment with the penalty for more serious crimes in the same jurisdiction. [Citation.] Third, they compared the punishment to the penalty for the same offense in different jurisdictions. [Citations.]" (*People v. Gray*, *supra*, at p. 992.)

As to the first prong of this analysis, "our examination of the nature of appellant and his offense must take into account his recidivist behavior. [Citation.]" (*People v. Gray*, *supra*, 66 Cal.App.4th at p. 992.) Appellant argues that although carjacking constitutes a violent offense because of the legal requirement of force and fear, appellant did not physically assault anyone or actually steal the car. He also argues that absent the effect of voter-approved Proposition 21, the Gang Violence and Juvenile Crime

Prevention Act of 1998, which increased the sentences for gang-related crimes, his maximum sentence would have been 19 years. He claims his criminal problems relate to drug abuse, and although he has accumulated many convictions in a short period of time, those convictions were not serious or violent felonies. However, "drug addiction is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511.)

We briefly set forth appellant's criminal history in rejecting his argument that his punishment is disproportionate as applied to this offense and this offender. The court found appellant in violation of his probation on two separate occasions. In addition, he committed the carjacking while on felony probation and summary probation in five separate misdemeanor cases. The series of crimes leading to the punishment imposed here demonstrate a dangerous pattern. Beyond driving under the influence, this is appellant's third conviction for crimes likely to cause great bodily injury. Appellant's sentence reflects his repeated engagement in dangerous criminal behavior.

Appellant's criminal history vitiates against his argument that his sentence constitutes cruel and unusual punishment. At 15, he committed a burglary. Approximately eight months later, he was convicted of battery. The following year, he committed vandalism and gave false information to a peace officer. As an adult, his criminal behavior became worse. He has one or more convictions for each year of his adult life, showing a pattern of increasing recency and intensity. Appellant has been convicted of resisting, delaying, or obstructing a peace officer four times in four years, including this offense. From 2002 to 2004, he has been convicted of misdemeanor assault likely to cause great bodily injury, felony drug possession, repeated violations of parole, and threatening bodily injury while brandishing a weapon. Finally, while on felony probation, appellant committed this carjacking with fellow gang members and again evaded police.

We also dismiss appellant's argument that no serious injury occurred. Carjacking is accomplished by means of force or fear. Though appellant did not assault anyone during the carjacking, his participation in the group furthered the violence that occurred. Carjacking, like a home invasion robbery, distinguishes itself from other crimes because of its propensity for violence. Carjacking elicits fear, and its prevalence in California communities necessitates harsh penalties to combat this plague.

For the second prong of the *Lynch* analysis, "a comparison of appellant's punishment for his current crimes with the punishment for other crimes in California is inapposite" since his association and intent to promote, further, or assist in criminal conduct by gang members places him under the special gang enhancement allegation. (*People v. Gray, supra,* 66 Cal.App.4th at p. 993.) Whether a particular punishment disproportionately relates to the offense is a question of degree. "The choice of fitting and proper penalty is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will." (*In re Lynch, supra*, 8 Cal.3d at p. 423.) Punishment does not become cruel or unusual simply because the Legislature mandates a lesser punishment for another crime. Leniency for one crime does not transform a reasonable punishment into something cruel or unusual. (*People* v. *Preciado* (1981) 116 Cal.App.3d 409, 412.)

In 2000, California voters approved Proposition 21. In Tulare County, 75.1 percent of voters supported this measure. Proposition 21 altered section 186.22 to impose harsher punishments against juvenile criminals and criminal street gangs to ensure the safety of Californians in their neighborhoods, parks, and schools. (Prop. 21, § 2, subd. (k).) In that aim, the proposition dramatically increased the penalty for home invasion robberies, carjacking, firing a gun at an inhabited home or vehicle, and firing a gun from a vehicle. (§ 186.22, subd. (b)(4)(B).) Contrasted to a simple theft, the nature of these four crimes tends to lead to increased violence and places people in fear for their

safety. With the rise of juvenile crime and the increasing boldness of street gangs, Proposition 21 sought to decrease violent juvenile crime. (Prop. 21, § 2, subds. (a) and (b).) In view of the dangerous nature of this type of offense, its propensity for violence, and the fear it creates in the community, the imposition of an indeterminate sentence of 15 years to life for a carjacking in association with a criminal street gang does not shock the conscience and offend fundamental notions of human dignity. (*People* v. *Preciado, supra,* 116 Cal.App.3d at p. 412.)

The final prong of the *Lynch* analysis has no conceivable relevance to the Eighth Amendment. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 989.) "That a State is entitled to treat with stern disapproval an act that other States punish with the mildest of sanctions follows *a fortiori* from the undoubted fact that a State may criminalize an act that other States do not criminalize *at all.*" (*Ibid.*) "'Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always [treat] particular offenders more severely than any other State." (*Id.* at p. 990.) Diversity in policy is the "very *raison d'être* of our federal system." (*Ibid.*) "The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions." (*Ibid.*)

Even entertaining appellant's argument, we find it a narrow presentation of similar crimes in other states. Respondent wholly refutes appellant's argument with a broader look at other states' punishments. As respondent argues, carjacking in Michigan can carry a life sentence. (Mich.C.L.A. § 750.529, subd. (a)(1).) Mississippi punishes carjacking for up to 15 years and armed carjacking for up to 30 years. (Miss. Code Ann. § 97-3-117.) If the crime is committed in association with a criminal street gang, it extends the sentence from one year to no more than one-half of the maximum term of imprisonment. (Miss. Code. Ann. § 97-44-19, subd. (2).) Thus, California's sentencing

requirements join part of a nationwide pattern of statutes calling for severe punishments for crimes committed in association with criminal street gangs.

For these foregoing reasons, we find appellant's sentence does not have a grossly disproportionate relationship to his crimes or is so disproportionate as to shock the conscience and offend fundamental notions of human dignity. (*In re Lynch*, *supra*, 8 Cal.3d at p. 424.) Thus, we conclude appellant's sentence fails to be cruel or unusual, and conforms to both the federal and state Constitutions. (*People v. Gray*, *supra*, 66 Cal.App.4th at p. 993.)

DISPOSITION

The judgment is affirmed.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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GOMES, J.

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HILL, J.